Supreme Court, U.S.
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No. 96-252

In the Supreme Court of the United States

OCTOBER TERM, 1996

DCX, INC., PETITIONER

v.

WILLIAM J. PERRY, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the decision of the Armed Services Board of Contract Appeals that the Department of Defense properly terminated for default its contract with petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-11a) is reported at 79 F.3d 132. The opinion of the Armed Services Board of Contract Appeals (Pet. App. 15a-34a) is reported at 94-2 BCA (CCH) ¶ 26,661.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1996. A petition for rehearing was denied on May 16, 1996. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on August 14, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 1, 1988, the Department of Defense awarded a contract to petitioner to produce flourescent light sets for use in medical tents. Pet. App. 20a. The contract required petitioner to perform various tests prior to delivery of the light sets, and to provide the government with a First Article Test Report (FATR) by June 30, 1988. *Id.* at 17a, 20a. The contract specified that, if petitioner failed to deliver the FATR on time, petitioner "shall be deemed to have failed to make delivery within the meaning of the Default clause of this contract." *Id.* at 18a-19a.

Petitioner subcontracted the required testing to Ball Brothers Aerospace Systems (Ball). Pet. App. 21a. Ball, however, did not commence the testing on schedule. On June 17, 1988, petitioner advised the government that Ball would not complete the testing process until July 11 and that the FATR would not be available until July 12. Petitioner blamed the delay on the government's Defense Priorities and Allocations System, which it claimed required Ball to postpone petitioner's tests in favor of higher priority government contracts. *Id.* at 26a. The contracting officer responded on July 1, advising petitioner that it was in default, but agreeing to forbear termination untii July 12, as petitioner had requested. *Id.* at 27a. Petitioner, however, failed to deliver the FATR by the extended due date of July 12. *Id.* at 28a. On July 13, the contracting officer, having received no explanation for the further delay or request for an additional extension, terminated the contract for default. *Id.* at 9a, 28a, 30a.

2. Petitioner sought review of this determination before the Armed Services Board of Contract Appeals

(ASBCA), alleging that the failure to deliver was caused by the government's priority system, and that the termination for default was arbitrary and capricious because it failed to comply with the applicable regulations. The ASBCA disagreed and upheld the contracting officer's decision. Pet. App. 15a-34a. The ASBCA found that "[t]here was insufficient evidence by [petitioner] to prove that Ball's actions in delaying starting its testing of the First Article was caused by Governmental action." *Id.* at 32a. Likewise, the ASBCA was "not persuaded by the evidence that [the] Government's termination of the contract for default in performance was improperly carried out or the result of arbitrary and capricious behavior on the part of the contracting officer." *Id.* at 33a. The ASBCA specifically found that the contracting officer had "adhered to the contract['s] specific terms covering nondelivery of the FATR as well as the applicable Federal procurement regulations." *Ibid.*

3. Petitioner then sought review in the Federal Circuit. That court affirmed, holding that the ASBCA was "warranted in finding that [petitioner's] failure to perform was attributable to its own negligence * * * rather than to the operation of" the government's priority system. Pet. App. 7a. The court of appeals also found "nothing in the record to persuade [it] that the termination contracting officer acted arbitrarily or capriciously in terminating the contract when he did." *Id.* at 9a.

ARGUMENT

The court of appeals' decision affirming the termination of petitioner's contract is correct and does not conflict with any decision of this Court or any other court of appeals. In addition, the primary issue raised

by petitioner is not squarely presented. Accordingly, further review of this case is not warranted.

1. The ASBCA correctly concluded that the contracting officer's decision was not arbitrary or capricious, finding that the contracting officer had abided by the contractual terms as well as the applicable federal regulations. Pet. App. 33a. Petitioner provides no basis for setting aside that finding. See 41 U.S.C. 609(b) (fact-finding of ASBCA "shall be final and conclusive" unless "fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if * * * not supported by substantial evidence"). The court of appeals upheld the ASBCA's determination "that the termination contracting officer adhered to both the terms of the contract and the requirements of the applicable procedural regulations." Pet. App. 7a. Further review of this factual issue is not warranted.

2. Petitioner argues (Pet. 10-18) that this Court should review the issue of whether the Federal Acquisition Regulation provisions regarding default confer rights upon government contractors. Specifically, petitioner points to 48 C.F.R. 49.402-3(f) (Pet. App. 81a), which says that a contracting officer "shall consider" seven enumerated factors when assessing whether to terminate a contract for default.

Whether 48 C.F.R. 49.402-3(f) confers rights upon government contractors, however, is not squarely presented by this case: The court of appeals held that the contracting officer complied with that provision here, concluding that the "officer's contemporaneous memorandum and hearing testimony demonstrate that he addressed the pertinent regulatory factors and found that they did not counsel against termination under the circumstances of this case." Pet App.

8a. The ASBCA likewise concluded that the contracting officer had complied with the applicable regulations. *Id.* at 33a. As a result, determining whether 48 C.F.R. 49.402-3(f) confers rights on contractors is not necessary to the resolution of this case.

After finding that petitioner's claim of a regulatory violation was without merit, the Federal Circuit held alternatively that 48 C.F.R. 49.402-3(f) "does not confer rights on a defaulting contractor." Pet. App. 8a. As the court of appeals explained, it was following the established precedents of the Boards of Contract Appeals in holding that, if—unlike the present case—a contracting officer failed to consider one or more of these factors, his decision to terminate a contract for default would not necessarily be overturned as an abuse of discretion. Instead, the noncompliance "may aid a Board of Contract Appeals or a court in determining whether a contracting officer has abused his discretion in terminating a contract for default." *Ibid.* There is no warrant for this Court to review this alternative holding of the expert court and boards to which Congress has entrusted primary responsibility for resolving government contracts disputes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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